Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Case No. 78-1573

JOHN JOHNSON,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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SUPREME COURT OF THE UNITED STATES

No. A-737

John Johnson,

Petitioner

v.

Ohio

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari to the above-entitled cause be, and the same is hereby, extended to and including April 14, 1979.

/S/ Potter Stewart
Associate Justice of
the Supreme Court of
the United States

Dated this 15th
day of February, 1979

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,	)	1978 Term
City of Columbus.	)	To wit: December 4, 1978
State of Ohio, Appellee,	)	
vs.	)	No. 78-510
John Johnson, Appellant.	)	REHEARING

It is ordered by the court that rehearing in this case is denied.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	)	1978 Term
City of Columbus.	)	To wit: November 9, 1978
State of Ohio, Appellee,	)	No. 78-510
vs.	)	APPEAL FROM THE COURT OF APPEALS
John Johnson, Appellant.	)	for Cuyahoga County

This Cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 36618

STATE OF OHIO,

Appellee

APPEAL FROM
COMMON PLEAS COURT
No. 23071-Cr.

-vs-

JOHN JOHNSON,

Appellant

JOURNAL ENTRY
AND OPINION

DATE: Jan. 30, 1978
STILLMAN, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Melissa Hinke, eight years old, was kidnapped, raped and murdered on November 20, 1975.

On that date, at approximately 2:35 p.m., another eight-year-old child named Kimberly Stephens was walking across an alley at West 52nd Street and Eichorn when she encountered a man in a car. He called to her, "Come here, little girl". Kimberly recalled that the man had dark hair, a moustache and glasses, and that the car in which he was seated was a red Buick with a black vinyl top. Kimberly

ran home. A nearby beverage store owner, Charles Bosak, witnessed the man's attempt to induce Kimberly Stephens into his car and, his suspicions aroused, noted the license number of the car. His wife promptly notified the police of the incident.

At approximately 3 p.m., an eleven-year-old, Mari Nettgen, was walking to a candy store located at West 51st Street and Clark when a red car approached her. The man seated within the car offered Miss Nettgen one dollar if she would tell him where ThomasJefferson High School was. Miss Nettgen described the man as wearing blue tinted glasses and sporting a moustache.

At approximately 3:30 p.m., Melissa Hinke was walking down West 67th Street towards the Lawson's store located at Lorain and West 67th Street with two empty quart Pepsi Cola bottles and some change with which to buy milk. Miss Hinke never returned home from her errand; her dead body was discovered two days later by a young boy in a wooded area of the Cleveland Metropolitan Park's Rocky River Reservation.

Near the end of the day on November 20, 1975, at approximately 11 p.m., several police officers went to defendant-appellant John Johnson's apartment on West Boulevard where they observed a red Buick with a black vinyl top and the same license number as the Buick reported by Mr. Bosak earlier that day in connection with the attempted abduction of Kimberly Stephens. The police peered into the car and saw two empty Pepsi bottles and a carton of Lawson's milk in

a paper bag. The police then proceeded to Johnson's apartment where they knocked upon the door. Johnson was awakened by the knock and answered it. According to the testimony of the police, Johnson invited them into the apartment and subsequently gave them permission to search his car. The two empty Pepsi Cola bottles were removed from Johnson's car as well as a towel which was determined on November 21, 1975, to have semen stains on it.

On November 21, 1975, after further investigation and after the stains on the towel had been analyzed, the police decided to question Johnson. At approximately 7:15 p.m., two police officers placed Johnson under arrest at the gas station where he was working. They also advised Johnson of his rights. Johnson's car, which was being repaired in a Shell station about one-half mile away from the gas station where he worked, was towed and impounded in the police station downtown. After a lie detector test was administered to Johnson, he was booked. The police officers testified that Johnson gave permission to search his car again. At or about 2:30 a.m. to 4:30 a.m., November 22, 1975, Johnson was taken to jail. The alleged intention of the police at this time was to take a written statement from Johnson and release him in the morning. Some four hours after the questioning was terminated, three police officers took Johnson from his jail cell and completed a release slip for his release from custody. In addition, Johnson made a written witness statement which detailed his whereabouts on November 20, 1975. However, shortly prior to Johnson's

scheduled release, the Homicide Department took charge of the case and rearrested, photographed and searched him. Johnson's clothes were also removed and confiscated by the police at this time. His car was inventoried and processed for fingerprints at the impound garage.

At about 10 a.m., November 22, 1975, a sixteen-year-old boy discovered the partially clothed body of Melissa Hinke with multiple stab wounds on the upper torso and rectal area. Johnson's apartment was searched pursuant to a search warrant and, among other things, bloody rags and bloody undershorts were found. On November 25, 1975, Johnson's car was searched again pursuant to a search warrant. The search revealed three burrs, a hair sample, a doll, and some wet rags. Between November 22, 1975, and November 28, 1975, several victims of attempted abductions were interviewed, including Kimberly Stevens, Lisa Chambers, Debra Main and Diane Lawson, all of whom identified the photograph of Johnson as someone who "looked like" their assailant. Further, Kimberly Stevens positively identified Johnson's photograph on November 22, 1975. Although Lisa Chambers was not 100 percent sure that the photograph of Johnson was the picture of the man who had accosted her, she did recognize Johnson at the police headquarters where she viewed him through a two-way mirror on November 28, 1975. At the time she saw him, he was dressed in prison clothes and was in a room with other policemen and detectives. On that same day, Johnson made an oral statement to Detective Ferris in which he admitted that the sweatshirt that he wore when

he arrived home on November 20, 1975, was "muddy and bloody". Ferris asked Johnson to make a written statement, but Johnson refused to make one in the absence of his attorneys. All oral statements made by Johnson after declining to make a written statement without his attorney were suppressed at trial.

Johnson testified in his own behalf only at the motion hearings and repeatedly denied that he had been read or informed of his rights. Moreover, he claimed that he was led to believe that he would be released if he made a statement and that he understood his oral declarations made to Detective Ferris to be off the record. Johnson also insisted that he never gave the police permission to search his car on the night of November 20, 1975.

On November 25, 1975, Johnson was indicted for the kidnapping, rape, and aggravated murder with specifications of Melissa Hinke. He was arraigned on November 28, 1975 and pled "not guilty". Johnson withdrew his "not guilty" plea and entered a plea of "not guilty by reason of insanity" on February 18, 1976. Voir dire of the jury began on February 23, 1976, and the jury selection was completed on February 24, 1976. The trial commenced the latter part of the day on February 24, 1976, and continued until March 5, 1976, at which time Johnson was found guilty as charged. On May 20, 1976, Johnson was sentenced to death for aggravated murder with specifications, and sentenced to seven to twenty-five years for kidnapping and rape, both sentences to be served consecutively. Johnson's notice of appeal was filed on June 14, 1976, and he assigns the following

errors:

"I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR CHANGE OF VENUE OR CONTINUANCE TO DISSIPATE THE EFFECTS OF PREJUDICIAL PRETRIAL PUBLICITY.

"II. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE STATEMENTS OBTAINED FROM THE APPELLANT IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS ON NOVEMBER 22 and 28, 1975.

"III. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE DERIVED FROM THE FOLLOWING SEARCHES AND SEIZURES, ALL OF WHICH WERE VIOLATIVE OF THE APPELLANT'S FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS:

"A. The November 21, 1975, Warrantless Search of the Appellant's Automobile and Seizure of Certain Items Found Inside.

"B. The Warrantless Arrest of the Appellant Without Probable Cause.

"C. The Warrantless Seizure of the Appellant's Automobile After His Arrest on November 21, 1975, and the Subsequent Searches of the Automobile.

"D. The Warrantless Seizure on November 22, 1975, of

the Appellant's Trunk Keys and Penknife.

"E. The Search of the Appellant's Apartment Pursuant to a Warrant on November 22, 1975.

"F. The Search of the Appellant's Automobile Pursuant to a Warrant on November 24, 1975.

"IV. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF ALLEGED PRIOR ACTS OF THE APPELLANT, FOR THE FOLLOWING REASONS:

"A. The Evidence Was Not Admissible Under Revised Code Section 2945.59.

"B. With Respect to Two of the Alleged Prior Acts, Identification of the Appellant as the Person Involved was Insufficient.

"C. Alleged Prior Acts Testimony Was Introduced Before the State Established a a Prima Facie Case.

"V. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING THE APPELLANT'S ACTIVITIES IN AN ADULT BOOK STORE.

"VI. THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY THAT APPELLANT HAD THE BURDEN OF PROVING THE DEFENSE OF INSANITY BY A PREPONDERANCE OF THE EVIDENCE.

"VII. THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY UNDER A CONSTITUTIONALLY DEFECTIVE STATUTORY SCHEME."

This case, in essence, presents a double trial for the court's consideration. Much of the argument offered by the appellant in his assignments of error relates to proceedings covering three full days of testimony in considering critical motions. There were considered by the court prior to the impaneling of a jury and the subsequent trial.

I. The first assignment of error charges that the trial court erred in denying a motion for change of venue or for a continuance to dissipate the effects of prejudicial pretrial publicity.

To sustain this assignment of error, the appellant urges that the pervasive pretrial publicity of a "prejudicial, hostile and incriminating kind" precluded the impaneling of a jury free of bias. We find this allegation of error to be unfounded. Of the original jury panel, fourteen were dismissed for cause. The defense exhausted its six peremptory challenges, although the prosecution did not. The process of impaneling the jury consumed two days and a supplemental array was not found necessary to complete the process of impaneling the jury.

In Murphy v. Florida (1975), 421 U.S. 794, the United States Supreme Court held that the exposure of prospective jurors to news accounts of an alleged crime do not presumptively deprive the defendant of due process. The exposure must be analyzed in relation to all the circumstances to determine the primary issue,

the fairness of the trial. The court called attention to the voir dire in the Murphy case, addressed to assuring the seating of a jury who constituted "a panel of impartial, 'indifferent' jurors". See Irvin v. Dowd (1961), 366 U.S. 717, 722. It is not, however, required that jurors be totally ignorant of the facts and issues involved in a case to qualify them as fair and impartial jurors. Murphy, supra, at 800.

In the instant case, there was a searching voir dire of the prospective jury panel by the trial judge as well as counsel for both the appellant and the state. In addition to this lengthy interrogation, when a question was raised as to the possible exposure of jurors to prejudicial overnight publicity which occurred during the impaneling process, the court authorized and supervised the conducting of an intensive personal, individual examination of each juror in chambers to ascertain the effect of such publicity upon each prospective juror.

In Nebraska Press Ass'n v. Stuart (1976), 427 U.S. 539, the United States Supreme Court held that the Sixth Amendment guarantee of "trial by an impartial jury" is so basic to our system of law that it must be protected by every possible effort. However, the court also declared that "pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial". Id., at 565.

The procedure followed in the instant case assured a fair trial.

For these reasons, we hold that the first assignment of error challenging the local venue of the trial and demanding a continuance has not been sustained within the factual or legal context before us. We, therefore, overrule this assignment of error.

II. The second assignment of error asserts that the trial court committed error in refusing to suppress statements elicited from the appellant in "violation of his Fourth, Fifth, Sixth and Fourteenth Amendment Rights on November 22 and 28, 1975."

The Amendments cited by the appellant declare in pertinent part:

"AMENDMENT [IV]

"[SEARCHES AND SEIZURES]

"The right of the poeple to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"AMENDMENT[V]

"[RIGHTS OF PERSONS]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"AMENDMENT [VI]

"[RIGHTS OF ACCUSED]

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

"AMENDMENT [XIV]

"[RIGHTS OF CITIZENS]

"§1 All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The first of the allegations in this assignment of error relates to statements elicited from the appellant on November 22, 1975. The appellant argues that the statements violated his right against self-incrimination. It is claimed that the appellant was exhausted at the time of his arrest on November 21, 1975, and that he was exposed to continuous police interrogation thereafter until the statements were made. Appellant asserts, therefore, that his statements were involuntary.

We recognize the appellant's complaint, but do not find factual or legal warrant for his conclusions in the testimony presented in this case. Although there is conflicting testimony, it is evident that the challenged statements offered by the appellant were in substance consistently exculpatory. Statements which were made by the appellant at the time of his initial interrogation were directed to the issue of his possible appearance as a witness, rather than as a suspect in the case. They were voluntary.

In Schneckloth v. Bustamonte (1973), 412 U.S. 218, the Supreme Court addressed the basic problems encompassed by this second assignment of error. The issue of voluntariness in making a statement is inextricably involved with the knowledge of the individual that he may remain silent if he chooses. The Schneckloth case declares that the police questioning of a suspect must be viewed in context.

The Court said:

"In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224; his lack of education, e.g., Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed. 2d 975; or his low intelligence, e.g., Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed. 2d 246; the lack of advice to the accused of his constitutional rights, e.g., Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; the length of detention, e.g., Chambers v. Florida, supra; the repeated and prolonged nature of the questioning, e.g., Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; and the use of physical punishment such as the deprivation of food or

sleep, e.g., Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948. In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. Culombe v. Connecticut, supra, 367 U.S., at 603, 81 S.Ct., at 1879.

"The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. See Miranda v. Arizona, 384 U.S. 436, 508, 86 S.Ct. 1602, 1645, 16 L.Ed.2d 694 (Harlan, J., dissenting); id., at 534-535, 86 S.Ct., at 1659-1660 (White, J., dissenting). In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative. See, e.g., Davis v. North Carolina, supra; Haynes v. Washington, supra, 373 U.S. at 510-511, 83 S.Ct., at 1341-1342;

Columbe v. Connecticut, supra, 367 U.S., at 610, 81 S.Ct., at 1883; Turner v. Pennsylvania, 338 U.S. 62, 64, 69 S.Ct. 1352, 93 L.Ed. 1810." Id., at 226-227.

Viewed in the light of Schneckloth, the instant case presents a set of facts in which the appellant repeatedly volunteered statements which were denials of his participation in the alleged crime and were in no sense admissions of guilt. Even accepting the appellant's assertion that he was misled by an early promise of release from custody or that legal counsel was not necessary at the stage of investigation then in progress, it cannot be asserted that the exculpatory statements elicited from him were prejudicial to the presentation of his defense.

The only statement injurious to his cause was made to Detective Ferris, and this statement was clearly volunteered by the appellant. The evidence demonstrates that Johnson, the appellant, requested other officers to leave the interrogation room while he spoke privately at his own volition to Detective Ferris.

The appellant also asserts that he wished to consult counsel at various indefinite times during his questioning. This has been denied by the state, citing the fact that he did have a lawyer, Michael Toth, at a very early stage of the proceedings. Moreover, there is substantial testimony that the appellant was repeatedly advised of his

Miranda rights, but that he nevertheless spoke freely to the interrogating officers until they were requested by his court-appointed counsel to desist from further questioning. The transcript makes it clear that the appellant spoke without major reservations to the officers throughout the interrogation because he was consistently denying implication in the crime. This was true on November 28, 1975 as well as on November 22, 1975.

For these reasons, therefore, we find that the court below did not violate the appellant's constitutional rights in refusing to suppress the voluntary statements made by the appellant.

III. The third assignment of error charges that the trial court erred in admitting evidence derived from searches, seizures and the arrest of the appellant in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution.

The first charge in the sequence of events questioned by the appellant objects to the search of the appellant's automobile in the early morning hours of November 21, 1975 without a warrant. We reject this assignment of error because the appellant consented to the search, lead the officers to his car without objection, and opened the car doors which he declared to have no operating locks.

The assertion by the appellant that he was responding to an unwarranted show of police force in performing these acts would lead to a legally untenable conclusion. This has been set forth logically and cogently in People v. Michael (1955), 45 Cal. 2d 751.

There the Court said:

> "It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority." Id. at 754.

In the circumstances present here, we are unable to discern any evidence of coercion or threat by the interrogating officers at the time of the requested automobile search. Nor was there any evidence of implied threat, coercion or compulsion at any further stage of the proceedings. The conflicting evidence with respect to advice of counsel as well as other Miranda rights, Miranda v. Arizona (1966), 384 U.S. 436, permitted the trial court considering the motions to determine as a matter of credibility that the appellant had been properly appraised of his constitutional rights by several officers at several times. In fact, when he was initially taken into custody in the early morning hours of November 22, 1975, the appellant himself indicated that he had been so advised. The court, at the conclusion of the appellant's testimony with respect to the lengthy series of motions, addressed him directly as follows:

> "Mr. Johnson, on the statement you gave on the 22nd of November, was this question asked of you and did you give this answer, 'When you were arrested, were you advised of your constitutional rights, and did you understand them?'
>
> "'Answer: Yes.'"

To this question by the court, the appellant responded:

> "I don't know whether I gave that answer or not, but if it is there, and I signed it." (Tr. 1417).

In addition to this testimony, the appellant was questioned on his statement with respect to the search of his car and home as follows:

> "'Did you give permission to the detectives of the Cleveland Police Department to search your car and home for any part of the clothing belonging to Melissa Hinke?'"
>
> * * *
>
> "Yes, I did give permission." (Tr. 1387).

These statements, although the appellant sought to question their specificity, remain in the record as stong indications of the effort by the investigation officers to comply with the requirements of Miranda.

The important aspect of the evidence as it emerged here is anticipated in

Schneckloth, supra, at 229:

> "The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searched. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.'"

The appellant's challenge to the warrantless search of his automobile and the seizure of various items found in the course of the search is therefore overruled.

A second objection contained within the third assignment of error charges

that the appellant was arrested without probable cause and without a warrant.

The circumstances leading to the arrest of the appellant were clearly within the provisions of R.C. 2935.03. This provides in pertinent part that:

> "When there is reasonable ground to believe that an offense of violence...has been committed, a... police officer may arrest without a warrant any person whom he has reasonable cause to believe is guilty of the violation...."

In the instant case, the court heard evidence that someone answering the description of the appellant had attempted to abduct a child other than Melissa Hinke within a half mile distance from the site of Melissa Hinke's disappearance on the same afternoon. There was sufficient reason to believe that the automobile whose license number had been provided to the investigating officers and which was listed to the appellant, had been involved in the prior attempted abduction. Under these circumstances, the rule established in State v. Fultz (1968), 13 Ohio St. 2d 79, is applicable. The court held in Syllabus 1:

> "To have probable cause to arrest without a warrant an officer must have sufficient information from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused."

Under the circumstances of the case, there was probable cause for the appellant's arrest.

For this reason, we overrule the appellant's assignment of error relating to his arrest without a warrant.

The third objection raised by the appellant within the third assignment of error challenges the seizure of his automobile after his arrest on November 22, 1975, and the subsequent searches of the automobile.

In view of the evidence establishing that the original search of the car was consensual, this argument is less than persuasive. The appellant not only permitted the officers to view both the exterior and the interior of his car, but also subsequently provided them with keys necessary for its operation and with a key required to open the trunk. Clearly, he had no objection to either the seizure or the search of the vehicle. The voluntariness standards prescribed by Schneckloth, supra, apply with equal validity here.

The fourth objection cited by the appellant to the seizure of the trunk keys and penknife on November 22, 1975, must fail for similar reasons.

The key and penknife were on the same key ring and were turned over by a coworker of the appellant with the appellant's voluntary consent to the investigating officers.

For this reason, we reject this allegation of error.

The fifth section of the appellant's third assignment of error challenges the search of the appellant's apartment

pursuant to a warrant issued on November 22, 1975. Objection is made to the contents of the warrant and to the admission of evidentiary items obtained as a result of its execution.

It would be a straining of judicial credulity to hold that the affidavit supporting the warrant alleging 1) the murder of a missing child, 2) the search of an automobile bearing license plates listed to the appellant, 3) the discovery of a towel in the vehicle found to have semen thereon, 4) the discovery of the body of the missing girl in the Cleveland Metropolitan Park North Olmsted area, and 5) the necessity for an early search of the residential premises occupied by the appellant, would not be sufficient to justify a warrant here. The challenge to Mr. Charles Bosak's information, providing the license number of appellant's vehicle in association with an apparently attempted abduction in the nearby vicinity and attacking his credibility as a "hearsay conclusion" does not accord with the affidavit statement concerning a witnessed attempted abduction.

We, therefore, hold that the warrant issuance requirements of Aguilar v. Texas (1964), 378 U.S. 108, have been satisfactorily met. The issuing magistrate who authorized the search warrant may do so on hearsay information provided that he is informed of some of the underlying circumstances on which the informant based his conclusions, and the circumstances from which the officer seeking the warrant determined the validity of the information. We find that these requirements were met in the affidavit

executed by the issuing magistrate, and therefore, overrule this objection.

The final challenge under the series of objections relating to search and seizure argues that the search of the appellant's automobile pursuant to a warrant issued on November 24, 1975, was invalid.

This warrant was issued upon an affidavit composed of three pages reciting in detail virtually all of the information available to the Homicide Unit of the Cleveland Police Department on the date of its execution. It articulates more than enough data to justify the issuance of a search warrant under the tests prescribed by the Supreme Court. The officer who sought the warrant related his long years of experience, and listed the specific items believed to be contained in the automobile registered to the appellant and impounded at that time at the Cleveland Police Department Impound Unit. The issuing magistrate reading the affidavit could clearly find the tests prescribed by Aguilar, supra, to be more than satisfactorily met. We hold that he did so.

We, therefore, overrule this assignment of error.

IV. The fourth assignment of error charges that the trial court committed error in permitting the prosecution to introduce evidence of alleged prior acts of the appellant.

R.C. 2945.59 provides:

"Proof of defendant's motive.

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

It should be emphasized in analyzing this provision of the Code that the question of a defendant's intent may be evidenced by a showing that he has performed similar acts prior to the acts which are the subject matter of the alleged offense. The appellant has sought to interpret the statute as narrowly requiring such evidence to be virtually identical with the acts charged in the principal case. The kidnapping of Melissa Hinke was, of course, a primary incident in the set of circumstances which eventuated in a rape and murder. R.C. 2945.59 is in essence an evidentiary statute, State v. Pigott (1964), 1 Ohio App. 2d 22. The production of evidence relating to a similar occurrence, namely overtures strongly suggestive of a child kidnapping becomes a matter of evidentiary relevance. In analyzing the argument of the appellant relating to this assignment of error,

the determination in State v. Carter (1971), 26 Ohio St. 2d 79, becomes significant. The court held there in Syllabus 1:

> "Where evidence, tending to prove the commission of a similar act by an accused, is offered by the state under R.C. 2945.59, it is not necessary for the state to establish the identity of the accused as the perpetrator of the similar act by proof beyond a reasonable doubt."

Syllabus 2:

> "In such case, it is sufficient for the admission of such evidence that it offers substantial proof that the alleged similar act was committed by the defendant."

In an earlier opinion, State v. Shively (1961), 172 Ohio St. 128, 131, the court admitted evidence of "alleged unusual circumstances" occurring near the defendant's home as indicative of immoral or strange conduct.

In the instant case, the testimony being challenged related to a prior occurrence in the near vicinity of Melissa Hinke's disappearance, and on the very date, and within a short time preceding her disappearance. Earlier that afternoon, the evidence demonstrated that someone sought to induce Kimberly Stevens to enter an automobile bearing the appellant's license number. This was at a time when the evidence indicated that the appellant was the driver of the vehicle. The state contends that this was not a "similar act", but was part of a continuous course of conduct by the appellant. We do not place major emphasis upon this distinction,

but hold that the evidence was admissible under the statute.

Evidence was also offered with respect to a similar act involving Mari Nettgen on November 20, 1975, and another act involving Lisa Chambers on November 14, 1975.

These three episodes were accepted by the court as similar acts within the purview of R.C. 2945.59, but two others of a comparable nature were rejected as evidence because the court did not evaluate them as sufficiently probative to warrant their consideration.

The instances which were accepted into evidence were those in which the appellant sought to entice school children into his car on their way to or from school. Obviously enough, such acts could not necessarily be regarded as identical to acts which occurred with respect to Melissa Hinke. We do not know the precise nature of these acts. Nevertheless, each of these acts represented a potential prelude to a violent occurrence of the kind which befell Melissa Hinke.

The court carefully instructed the jury on the limitations which are properly to be placed on such evidence, and this restraint upon the jury served to confine the consideration of this testimony to its proper boundaries.

Hence, appellant's argument regarding similar acts is rejected.

A secondary consideration involved in the fourth assignment of error relates

to the identification of the appellant as the person involved in these occurrences and the appellant asserts that this identification was insufficient.

Under the law outlined in State v. Carter, supra, the requirement for proof of identity in these circumstances is "substantial" rather than beyond a reasonable doubt.

The combined testimony of Kimberly Stevens, Mari Nettgen and Charles Bosak established a substantial measure of evidentiary proof. Although Bosak did not see the driver clearly, his attention was so markedly directed to the episode in which the driver attempted to entice Kimberly Stevens into his car that it prompted him to memorize and write down the license number of the vehicle at once. Kimberly Stevens did not identify the appellant in court, but she described the vehicle clearly. (Tr. 646, 651, 658). Mari Nettgen identified the appellant at the motion hearing and the trial in chief. (Tr. 815, 1782).

Lisa Chambers identified the appellant (Tr. 850, 1808), and also identified his automobile as the car used in her attempted pickup on November 14, 1975. This identification was made at the Impound Lot of the Cleveland Police Department. (Tr. 1810).

These questions of identification have been challenged not only for their alleged insufficiency by the appellant, but also because they were allegedly introduced before the state had established a prima facie case.

The state must establish a prima facie case before introducing evidence of similar acts. State v. DeRighter (1945), 145 Ohio St. 552. The alleged effort to entice Kimberly Stevens into the appellant's vehicle took place at approximately 3 p.m. on November 20, 1975. This was unsuccessful because the child ran away. The conduct charged by the prosecution with respect to Melissa Hinke followed immediately thereafter. This was sufficient to establish a prima facie case for the introduction of evidence of a similar act with respect to Lisa Chambers.

For this reason, we hold that the testimony was properly admitted in this sequence and that the defendant was in no way prejudiced by this procedure.

V. The fifth assignment of error charges that the trial court erred in admitting testimony concerning the appellant's activities in an adult bookstore on November 20, 1975.

The appellant contends that the evidence of the appellant's presence at a pornographic bookstore on the date of the alleged occurrence was prejudicial. We do not agree.

The evidence establishes part of the time period and activities of the appellant on the date of the alleged offense. His whereabouts at about 5:30 p.m. of that date are matters in issue. They are outside of the context of similar acts contemplated in R.C. 2945.59, but they are admissible to demonstrate the continuity of activities indulged in by the appellant on November 20, 1975.

We find no prejudice to the appellant in their admission, and therefore, overrule this assignment of error.

VI. Assignment of error number six asserts that the trial court committed plain error in instructing the jury that the appellant had the burden of proving the affirmative defense of insanity by a preponderance of the evidence. The appellant relies upon State v. Robinson (1976), 47 Ohio St. 103, and its interpretation of R.C. 2901.05(A). That case requires that where a defendant has asserted an affirmative defense, he must go forward with evidence of a nature sufficient to raise the defense, but is not required to prove the existence of such defense by a preponderance of the evidence as provided in R.C. 2901.05 (A)(1974).

This Robinson ruling has been interpreted by the Supreme Court in subsequent cases which also raised the affirmative defense burden issue. State v. Williams (1977), 51 Ohio St. 112, and State v. Humphries (1977), 51 Ohio St. 95. In Humphries, as in the instant case, the trial court incorrectly instructed the jury that the defendant had the burden of persuasion in proving the affirmative defense of insanity by a preponderance of the evidence. The Court of Appeals for Franklin County in that case held that the defendant, by failing to object to the jury instruction, had waived the error on appeal. The Supreme Court of Ohio affirmed the Court of Appeals and declined to reverse a conviction for aggravated murder, grand theft, aggravated burglary and rape. The court said at 103:

> "Notwithstanding that the trial court in State v. Humphries, case No. 76-1150, incorrectly instructed the jury that the defendant has the burden of persuasion in proving the affirmative defense of insanity, the Court of Appeals for Franklin County correctly held that the defendant, by failing to object to the jury instruction, waived the error on appeal...."

In the Humphries case, this error was assigned at the appellate level as it is here. We have already found Humphries dispositive of this issue.

This Court of Appeals has recently decided the site of State v. Edwards (8th Dist., Dec. 1, 1977), Case No. 36641. In this case, the affirmative defense of self-defense was asserted and the court charged improperly as to the burden of persuasion under R.C. 2901.05(A) and State v. Robinson, supra. However, the defendant failed to object prior to the retirement of the jury. We cited Crim. R. 30 in this context.

Crim. R. 30 provides in part:

> "A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection...."

The same circumstances obtained in the instant case. The instruction offered

to the jury was erroneous under the R.C. 2901.05(A) interpretation provided in Robinson, but no objection was made prior to jury retirement. In Edwards, and in the trials of Williams and Humphries, precisely as in the instant case, the court acted prior to the Ohio Supreme Court's decision in Robinson, but subsequent to the enactment of R.C. 2901.05(A). We are bound by the Supreme Court's determination.

For this reason, we overrule the sixth assignment of error.

VII. The seventh assignment of error declares that the trial court erred in imposing the death penalty under a constitutionally defective statutory scheme.

The Ohio Supreme Court has addressed this issue specifically in State v. Bayless (1976), 48 Ohio St. 2d 73. It is unnecessary to recapitulate the reasoning of the unanimous Ohio Supreme Court in sustaining the constitutionality of the legislation which was adopted by the Ohio General Assembly following the decision in Furman v. Georgia (1972), 408 U.S. 238. A prescribed system for the determination of cases involving the death penalty has been established by Ohio statute. It is directly addressed to the infirmities which were present in the death penalty statutes of Louisiana and North Carolina. Statutes in Georgia, Florida and Texas relating to the death penalty were upheld by the United States Supreme Court, and in the judgment of the Supreme Court of Ohio, the statutory scheme now established by R.C. 2929.02, 2929.03 and 2929.04 is "basically similar to the Georgia, Florida and Texas statutes

which the Court [United States Supreme Court] found to be constitutional." State v. Bayless, supra, at 83. In view of the rulings of the Ohio State Supreme Court, we find that all three of the objections raised in the seventh assignment of error are in substance governed by the Bayless case. (See also State v. Black (1976), 48 Ohio St. 2d 262, State v. Bell (1976), 48 Ohio St. 2d 270, and State v. Woods (1976), 48 Ohio St. 2d 127). In all of these cases, the issues of due process and equal protection were addressed by the court. It has now been determined by the Ohio Supreme Court that the Ohio death penalty provisions, as now operative, are constitutional.

For the reasons stated, therefore, we find none of the assignments of error to be valid, and accordingly affirm.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JOURNALIZED FEB 21 1978
GERALD E. FUERST, Clerk of Courts
By /s/Peggy Moguel Deputy

KRENZLER, P.J.,

STILLMAN, J.,

WASSERMAN, J.*, CONCUR
(*Wasserman, J., retired of the 8th Appellate District, SAUL J. STILLMAN sitting by assignment.)

/s/Saul G. Stillman
Judge

For plaintiff-appellee: John T. Corrigan

For defendant-appellant: Ralph Sperli, Bernard Berkman

EXCERPTS FROM APPLICATION FOR REHEARING TO THE OHIO COURT OF APPEALS EIGHTH DISTRICT

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee	)	CASE NO. 36618
-vs-	)	MOTION FOR RECONSIDERATION
JOHN JOHNSON, Defendant-Appellant	)	

* * *

MEMORANDUM

Appellant John Johnson has moved this Court to reconsider its decision of January 30, 1978, which overruled all of the assignments of error asserted by the appellant and affirmed the sentence and judgment rendered by the Common Pleas Court. In overruling the assignments of error asserted by the appellant, this Court has misapplied the controlling law to the facts set forth in the official record of this case and has failed to consider all of the errors assigned and briefed by the appellant, as prescribed by Rule 12(A) of the Ohio Rules of Appellate Procedure.

I. As the first assignment of error, appellant asserted that the trial court erred in denying the appellant's motion for change of venue or continuance to dissipate the effects of prejudicial pre-trial publicity. In overruling this assignment of error, the Court relied principally upon Murphy v. Florida, 421 U.S. 794 (1975). The Supreme Court stated in that decision that, upon the facts presented in that case, the jurors' exposure to publicity had to be viewed from the totality of the circumstances. 421 U.S. at 799. The Supreme Court distinguished the facts in Murphy from those presented in Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); and Irvin v. Dowd, 366 U.S. 717 (1961), where the Court reasoned that a change of venue or continuance is constitutionally compelled when there is a reasonable likelihood that prejudicial publicity will prevent a fair trial.

The facts presented in Murphy are easily distinguishable from those presented here. The Court emphasized in Murphy that most of the jurors had only a vague recollection of any publicity concerning the accused. 421 U.S. at 800. Furthermore, the Court stated that it is necessary to "distinguish between mere familiarity with [the accused] or his past [as in Murphy] and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory." Murphy v. Florida, supra, 421 U.S. at 800, n. 4 (see, also, 421 U.S. at 802).

In the instant case, all but one of the jury panel who were questioned admitted exposure to the massive publicity surrounding the case. Moreover, the jurors were not probed during voir dire to reveal the full effect of publicity. The trial judge consistently posed leading questions which elicited premature statements of the ability to be impartial (see, e.g., 1T. 42-44, 47-50, 62). Significantly, in Murphy, the Court remarked that the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights...." Murphy v. Florida, supra, 421 U.S. at 800.

The record in this case abundantly documents the inaccurate, invidious and inflammatory publicity which enveloped the community and prevented a fair trial for the appellant. Accordingly, the Court should reconsider its decision and reverse and remand.

II. The second assignment of error asserts that the trial court erred by not suppressing statements obtained from the appellant on November 22 and 28, 1975, in violation of his Fourth, Fifth, Sixth and Fourteenth Amendment rights. This Court overruled the assigned error and found that the statements were "exculpatory" and "voluntary". The Court asserts that Schneckloth v. Bustamonte, 412 U.S. 218 (1973) governs in this situation. However, Schneckloth presented a question of the voluntariness of a consent to search and the Supreme Court expressly limited its holding to a question of "consent" and expressly distinguished its holding from the rule of law applicable to those situations where rights to a fair trial were involved, such as a waiver

of counsel before making statements to police. Schneckloth v. Bustamonte, 412 U.S. 218, 235-246 (1973).

The State bears the burden of showing that a defendant has made a voluntary, knowing and intelligent waiver of the privilege to remain silent. State v. Jones, 37 Ohio St. 2d 21, 25 (1974). Furthermore, the Supreme Court expressly stated that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966)(Emphasis added).

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not readily waive his rights. In these circumstances, the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." Miranda v. Arizona, supra, at 476 (Emphasis added).

The Court states that the record shows appellant spoke "without major reservation" throughout interrogation because he was consistently denying

implication in the crime. However, the Court has failed to apply the rule enunciated in State v. Jones, supra, 37 Ohio St. 2d at 26-27:

> "If a defendant subsequently acts in such a way as to reasonably alert an interrogating officer that the warning given may have been misapprehended, the officer must, before any further questioning, insure that the defendant fully and correctly understands his Fifth Amendment rights."

The record is replete with evidence showing that the appellant was misled and that he misunderstood his rights, assuming that he was informed of them. The Court should reverse and remand.

The Court has failed to address the asserted errors that the statements were the fruit of an illegal arrest and that the post-indictment statement violated the rule enunciated in Massiah v. United States, 377 U.S. 201 (1964) and reaffirmed in Brewer v. Williams, ____U.S.____, 97 S.Ct. 1232 (1977).

III. The third assignment of error specified that the trial court erred in admitting evidence derived from six distinct searches and seizures in violation of the appellant's Fourth, Fifth and Fourteenth Amendment rights.

This Court found no error concerning the search of the appellant's car on November 21, 1975, even though the record clearly shows that the appellant, small in stature, was awakened, after midnight, by

four armed, uniformed police who announced they were on official business. There was no evidence that the appellant was advised of his right to refuse or his right to counsel at this juncture in his contact with the police, contrary to the assertion by this Court. In fact, evidence showed he was not advised of his right to demand a warrant (2T. 997). The appellant was arrested at least nineteen hours after the midnight search, and his answers in the written statement concerning being informed of his rights referred solely to the time of arrest.

Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973) mandates consideration of the "vulnerable subjective state" of the individual who has allegedly consented. Moreover, courts must be especially alert for coercion, express or implied, no matter how subtle. Id., at 228. The State's burden of proving consent cannot be satisfied by showing mere acquiescence to a claim of authority. Bumper v. North Carolina, 391 U.S. 543 (1968); City of Lakewood v. Smith, 1 Ohio St. 2d 128, 205 N.E. 2d 388 (1965). On the facts presented in this record, the State clearly failed to meet its burden to show consent.

The Court overruled the assertion of error concerning the warrantless arrest of the appellant on November 21, 1975, on the basis that there was probable cause to believe that the appellant had been involved in an attempted abduction of another child. However, the evidence is clear that the man Mr. Bosak saw at the "attempted abduction" had a beard. The appellant did not have a beard. Furthermore, the record reveals no effort by the

police to determine if someone else was driving the appellant's car until long after the appellant was arrested. At the time of arrest, the facts may have supported suspicion but certainly not probable cause to justify the appellant's arrest in connection with the disappearance of Melissa Hinke. The State had the burden to show probable cause for the warrantless arrest and the record is devoid of sufficient evidence to meet that burden.

The Court overruled the assigned errors concerning the seizure of the appellant's car following his arrest and the seizure of the trunk keys and penknife because of voluntary consent. The Court has based its finding of consent upon the alleged consent which was obtained to search the appellant's car nineteen hours before the appellant's arrest. The Ohio Supreme Court rejected a similar argument of continuing consent, upon facts much less compelling, in City of Lakewood v. Smith, 1 Ohio St. 2d 128, 205 N.E. 2d 388 (1965). Moreover, it is well recognized that the burden on the prosecution of showing consent, free from intimidation and duress, is particularly heavy where the individual is under arrest. Non-resistance to orders or suggestions does not constitute consent. Judd v. United States, 190 F. 2d 649, 651 (D.C. Cir. 1951); United States v. Rothman, 492 F. 2d 1260 (9th Cir. 1974). The record here demonstrates nothing more than mere non-resistance while in custody. Accordingly, the State has not met the burden of proof.

Assigned errors concerning the search of appellant's apartment on November 22, 1975 and the search of his car on

November 24, 1975, pursuant to warrants, also were overruled by the Court. The Court concluded that "the challenge to Mr. Charles Bosak's information, providing the license number of appellant's vehicle in association with an apparently attempted abduction in the nearby vicinity and attacking his credibility as a 'hearsay conclusion' does not accord with the affidavit statement concerning a witnessed attempted abduction."

The affidavit provides only that "it was learned from one Mr. Bosak that John A. Johnson's 1968 Buick, Ohio license number 350184, red body black vinyl top, was seen at or near the area where said Melissa Hinke was last seen and that Mr. Bosak further observed the driver of the above described vehicle attempt to abduct a young female child the same having occurred at or near the time of Melissa Hinke's disappearance."

There are absolutely no facts or underlying circumstances detailed from which an independent magistrate could conclude that an attempted abduction had taken place. The magistrate is left to rely solely upon Mr. Bosak's totally unsupported conclusion that he had witnessed an attempted abduction.

In State v. Gill, 49 Ohio St. 2d 177, 179 (1977), the Court recently reaffirmed that affidavits "must, in order to insure that magistrates determine probable cause for themselves, incorporate 'a substantial basis for crediting the hearsay.' [T]hat 'substantial basis' must include (1) information about the facts upon which the informant based his allegations of criminal activity, and (2) 'some of the underlying

circumstances from which the officer concluded that the informant was credible or his information reliable'." (Citations omitted). The affidavit in this case satisfies neither of the two prongs of the requirement for issuance of a valid warrant. State v. Gill, supra, requires that the assigned error be upheld and that this Court reverse and remand. For similar reasons, the warrant for the search of the car must also fail because of bald, uncorroborated conclusions contained in the affidavit.

The Court has failed to discuss the error asserted concerning the invalidity of the warrants because the affidavits contain knowing false statements, or recklessly asserted material statements which are false. United States v. Luna, 525 F. 2d 4, 8 (6th Cir. 1975), cert. denied, ____U.S.____, 96 S.Ct. 1459 (1976).

IV. The appellant, in his fourth assignment of error, asserted that the trial court erred in admitting evidence of alleged prior acts of the appellant for three separate and distinct reasons. However, in overruling the fourth assignment of error, this Court failed to address the specifically briefed error that Lisa Chambers' identification of the appellant was obtained in a constitutionally defective manner under the rules of law established in United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Foster v. California, 394 U.S. 440 (1969).

* * *

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

State of Ohio — Court of Appeals No. 36618

Appellee

-vs- — Lower Court No. C.P. 23071 Cr.

John Johnson — Motion No. 39410

Appellant

Date Feb. 21, 1978

JOURNAL ENTRY

Motion by appellant for reconsideration overruled. Exc.

STILLMAN, P.J.,

KRANZLER, J.,

WASSERMAN, J., CONCUR
Wasserman, J., retired
sitting by assignment.

/s/ Saul G. Stillman
SAUL G. STILLMAN

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PROPOSITIONS OF LAW PRESENTED IN MEMORANDUM IN SUPPORT OF JURISDICTION TO THE SUPREME COURT OF OHIO

Proposition of Law No. I:

A CHANGE OF VENUE OR A CONTINUANCE IS REQUIRED WHERE THE REASONABLE LIKELIHOOD THAT PREJUDICIAL PRETRIAL PUBLICITY WILL PREVENT A FAIR TRIAL HAS BEEN SHOWN BY AFFIRMATIVE PROOF OF THE PREJUDICIAL PUBLICITY AND BY THE VOIR DIRE EXAMINATION OF THE JURY.

Proposition of Law No. II:

THE INTRODUCTION INTO EVIDENCE OF STATEMENTS OF THE DEFENDANT OBTAINED WHILE IN POLICE CUSTODY, IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, REQUIRES A REVERSAL OF THE DEFENDANT'S CONVICTIONS.

Proposition of Law No. II(A):

THE INTRODUCTION INTO EVIDENCE OF STATEMENTS OF THE DEFENDANT OBTAINED WHILE IN POLICE CUSTODY ON NOVEMBER 22, 1975, WITHOUT HAVING BEEN ADVISED OF HIS CONSTITUTIONAL RIGHTS, OR HAVING UNDERSTOOD THEM, REQUIRES REVERSAL OF HIS CONVICTIONS BECAUSE OF THE DENIAL OF DEFENDANT'S RIGHT AGAINST SELF INCRIMINATION.

Proposition of Law No. II(B):

THE INTRODUCTION INTO EVIDENCE OF STATEMENTS OF THE DEFENDANT OBTAINED

WHILE IN POLICE CUSTODY ON NOVEMBER 22, 1975, REQUIRES REVERSAL OF HIS CONVICTIONS WHERE DEFENDANT'S REQUEST FOR AN ATTORNEY WAS REFUSED.

Proposition of Law No. II(C):

THE INTRODUCTION INTO EVIDENCE OF STATEMENTS OF THE DEFENDANT OBTAINED WHILE IN POLICE CUSTODY FOLLOWING AN ILLEGAL ARREST DENIED DEFENDANT HIS FOURTH AMENDMENT RIGHTS AND A REVERSAL OF HIS CONVICTION IS REQUIRED.

Proposition of Law No. II(D):

THE INTRODUCTION INTO EVIDENCE OF AN ORAL STATEMENT OF THE DEFENDANT ELICITED DURING A POLICE CUSTODIAL INTERROGATION ON NOVEMBER 28, 1975, REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTIONS WHERE THE DEFENDANT'S REQUEST TO CONSULT WITH AN ATTORNEY WAS REFUSED.

Proposition of Law No. II(E):

THE INTRODUCTION INTO EVIDENCE OF AN ORAL STATEMENT OF THE DEFENDANT ELICITED DURING A POLICE CUSTODIAL INTERROGATION ON NOVEMBER 28, 1975, AFTER THE DEFENDANT HAD BEEN INDICTED AND IN THE ABSENCE OF COUNSEL, REQUIRES A REVERSAL OF DEFENDANT'S CONVICTIONS.

Proposition of Law No. III:

THE INTRODUCTION OF EVIDENCE DERIVED FROM SEARCHES, SEIZURES AND THE ARREST OF THE DEFENDANT, ALL OF WHICH WERE VIOLATIVE OF THE APPELLANT'S FOURTH, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS, REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

Proposition of Law No. III(A):

THE INTRODUCTION OF EVIDENCE DERIVED FROM THE NOVEMBER 21, 1975, WARRANTLESS SEARCH OF THE APPELLANT'S AUTOMOBILE AND SEIZURE OF CERTAIN ITEMS FOUND INSIDE REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTION WHERE CONSENT WAS THE ONLY JUSTIFICATION PROFFERED BY THE STATE AND THE RECORD DEMONSTRATES NO MORE THAN MERE ACQUIESCENCE TO AUTHORITY.

Proposition of Law No. III(B):

THE INTRODUCTION OF EVIDENCE DIRECTLY DERIVED FROM THE WARRANTLESS ARREST OF THE DEFENDANT WITHOUT PROBABLE CAUSE REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

Proposition of Law No. III(C):

THE INTRODUCTION OF EVIDENCE DERIVED FROM THE WARRANTLESS SEIZURE OF DEFENDANT'S AUTOMOBILE AFTER HIS ARREST AND THE SUBSEQUENT SEARCHES OF THE AUTOMOBILE VIOLATED DEFENDANT'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS AND REQUIRE REVERSAL OF HIS CONVICTIONS.

Proposition of Law No. III(D):

THE INTRODUCTION INTO EVIDENCE OF DEFENDANT'S PENKNIFE WHICH HAD BEEN SEIZED WITHOUT A WARRANT ON NOVEMBER 22, 1975, WITH DEFENDANT'S TRUNK KEYS REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS WHERE THE ITEMS WERE SEIZED WITHOUT CONSENT OF THE DEFENDANT, IN VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

Proposition of Law No. III(E):

THE INTRODUCTION OF EVIDENCE SEIZED DURING A SEARCH OF THE DEFENDANT'S APARTMENT PURSUANT TO WARRANT ON NOVEMBER 22, 1975, REQUIRES REVERSAL WHERE THERE WAS NO PROBABLE CAUSE FOR THE ISSUANCE OF THE WARRANT AND THE AFFIDAVIT IN SUPPORT OF THE WARRANT CONTAINED KNOWN FALSE STATEMENTS OR RECKLESSLY ASSERTED MATERIAL STATEMENTS WHICH WERE FALSE.

Proposition of Law No. III(F):

THE INTRODUCTION OF EVIDENCE SEIZED DURING A SEARCH OF THE DEFENDANT'S AUTOMOBILE PURSUANT TO A WARRANT ON NOVEMBER 24, 1975, REQUIRES THE REVERSAL OF THE DEFENDANT'S CONVICTIONS WHERE THERE WAS NO PROBABLE CAUSE FOR THE ISSUANCE OF THE WARRANT, THE AFFIDAVIT IN SUPPORT OF THE WARRANT CONTAINED KNOWN FALSE STATEMENTS OR RECKLESSLY ASSERTED MATERIAL STATEMENTS WHICH WERE FALSE, AND INFORMATION WHICH WAS OBTAINED FROM AN ILLEGAL SEARCH AND SEIZURE.

* * *

Proposition of Law No. IV(C):

THE INTRODUCTION OF EVIDENCE OF AN ALLEGED PRIOR ACT REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTIONS WHERE THE IN-COURT AND OUT OF COURT IDENTIFICATIONS OF THE DEFENDANT WERE OBTAINED IN A CONSTITUTIONALLY DEFECTIVE MANNER.

ASSIGNMENT OF ERRORS TO THE OHIO COURT OF APPEALS - EIGHTH DISTRICT

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR CHANGE OF VENUE OR CONTINUANCE TO DISSIPATE THE EFFECTS OF PREJUDICIAL PRETRIAL PUBLICITY.

II. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE STATEMENTS OBTAINED FROM THE APPELLANT IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS ON NOVEMBER 22 AND 28, 1975.

III. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE DERIVED FROM THE FOLLOWING SEARCHES AND SEIZURES, ALL OF WHICH WERE VIOLATIVE OF THE APPELLANT'S FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS:

A. The November 21, 1975, Warrantless Search of the Appellant's Automobile and Seizure of Certain Items Found Inside.

B. The Warrantless Arrest of the Appellant Without Probable Cause.

C. The Warrantless Seizure of the Appellant's Automobile After His Arrest on November 21, 1975, and the Subsequent Searches of the Aubomobile.

D. The Warrantless Seizure on November 22, 1975, of the Appellant's Trunk Keys and Penknife.

E. The Search of the Appellant's Apartment Pursuant to a Warrant on November 22, 1975.

F. The Search of the Appellant's Automobile Pursuant to a Warrant on November 24, 1975.

IV. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF ALLEGED PRIOR ACTS OF THE APPELLANT, FOR THE FOLLOWING REASONS:

A. The Evidence Was Not Admissible Under Revised Code Section 2945.59.

B. With Respect to Two of the Alleged Prior Acts, Identification of the Appellant as the Person Involved was Insufficient.

C. Alleged Prior Acts Testimony Was Introduced Before the State Established a Prima Facie Case.

V. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING THE APPELLANT'S ACTIVITIES IN AN ADULT BOOK STORE.

VI. THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY THAT APPELLANT HAD THE BURDEN OF PROVING THE DEFENSE OF INSANITY BY A PREPONDERANCE OF THE EVIDENCE.

VII. THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY UNDER A CONSTITUTIONALLY DEFECTIVE STATUTORY SCHEME.

STATE OF OHIO) ss.
Cyyahoga County)

IN THE COURT OF COMMON PLEAS
May Term, 1976
To-wit: May 20, 1976

STATE OF OHIO	)	No. CR-23071
Plaintiff	)	
	)	INDICTMENT
vs.	)	Kidnapping w/ct
	)	Rape w/ct Aggr.
John A. Johnson	)	Murder with
Defendant	)	Specifications

JOURNAL ENTRY

Now comes the Prosecuting Attorney on behalf of the State and defendant, John A. Johnson was brought into Court, represented by counsel.

Defendant, on a former day of Court, having been found guilty by a Jury of Kidnapping, RC. 2905.01, first count, Guilty of Rape, RC. 2907.02, second count, and Guilty of Aggravated Murder, RC. 2903.01, with Specifications #1, and #2, guilty of Aggravated Murder during a Kidnapping and during a Rape, as charged in the third count of the indictment, was this day inquired of if he had anything to say why judgment should not be pronounced against him and he having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced.

It is therefore, ordered and adjudged by the Court that you, John A. Johnson, be taken from the bar of this Court to the Jail of this County, thence

within thirty (30) days by the Sheriff of this County be taken to the Chillicothe Correctional Institution, Chillicothe, Ohio, and that the said Sheriff there deliver you to the Warden of the Southern Ohio Correctional Facility, Lucasville, Ohio, and that you be Kept in the said Southern Ohio Correctional Facility, and that on the 20th day of November, 1976, before the hour of Sunrise of said day, and in accordance with the law and within the walls of said Southern Ohio Correctional Facility at Lucasville, Ohio, the Warden or Deputy Warden of said Southern Ohio Correctional Facility, shall cause a current of electricity to pass through your body and that the application of such current of electricity be continued until you, John A. Johnson are dead, pursuant to the third count of the indictment, RC. 2903.01, according to law. It is further ordered by the Court that John A. Johnson be imprisoned and confined for a period of seven (7) to twenty-five (25) years, as to the first count, RC. 2905.01, and for a period of seven (7) to twenty-five (25) years, as to the second count of the indictment, RC. 2907.02, all according to law. Counts to run consecutive.

Transcript ordered at State's expense.

Francis E. Sweeney, Judge

va 5/21

/s/ Francis E. Sweeney
Judge

STATE OF OHIO) ss.
Cuyahoga County)

IN THE COURT OF COMMON PLEAS
January Term, 1976
To-Wit: Feb. 28, 1976

STATE OF OHIO	)	No. CR 23071
Plaintiff	)	
	)	
vs.	)	INDICTMENT
	)	Kidnapping w/cts
John A. Johnson	)	
Defendant	)	

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and defendant John A. Johnson was brought into Court, represented by counsel.

Jury trial in progress.

Motions to Suppress are overruled.

On trial.

Opening statements and production of evidence thru witnesses.

Judge Francis E. Sweeney

rg 3/9/76

Judge /s/ F. Sweeney

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STATE OF OHIO) ss.
Cuyahoga County)

IN THE COURT OF COMMON PLEAS
January Term, 1976
To-Wit: Feb. 25, 1976

STATE OF OHIO	)	No. CR 23071
Plaintiff	)	
	)	INDICTMENT
vs.	)	Kidnapping w/cts
	)	
John A. Johnson	)	
Defendant	)	

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and Defendant, John A. Johnson was brought into Court represented by Counsel. Jury Trial.

Hearing on defendant's Motions. On trial.

Motion for Change of Venue is overruled.

Motion for Continuance is overruled.

Motion to Dismiss the Jury panel is overruled.

Judge Francis E. Sweeney

rg 3/4/76

Judge /s/ F. Sweeney

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EXCERPTS FROM OFFICIAL TRANSCRIPT OF PROCEEDINGS - STATE V. JOHN JOHNSON, CUYAHOGA COUNTY COMMON PLEAS COURT - RULINGS ON PRETRIAL MOTIONS - TRANSCRIPT PAGES 1533 - 1538

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(SATURDAY MORNING SESSION, FEBRUARY 28, 1976.)

(Thereupon further proceedings were had in the absence of the jury as follows:)

THE COURT: Now, the Court has made a determination over the evening hours on all the Motions to Suppress and all other Motions filed by the defense in this case and the Court will rule on them.

MR. CAIN: Your Honor, is it necessary that the defendant be present?

THE COURT: I thought he was here. Why isn't he here?

All right. The Court has heard the testimony over a four day period on Motions to Suppress and heard all the evidence the prosecution has, has weighed all the evidence together with the determination of the credibility of the witnesses on the evidence and the Court rules in the following manner:

Motion to Suppress, Search and Seizure of items from defendant's automobile at around 12:15 A.M., November 21st, the Court overruled. The defendant knowingly and intelligently consented

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and the items may be admitted in evidence.

The section motion as to Search and Seizure with warrant on or about the 22nd of November, 1975, is overruled. The Court finds there was adequate statement of probable cause in the attached affidavit to cause the Judge to sign the warrant and subsequent search and seizure was lawful and properly executed.

Three, Motion to Suppress Search and Seizure of car with warrant is overruled.

The Court finds there was an adequate statement of probable cause in the attached affidavit because the Judge signed the warrant and the subsequent search and seizure was lawful and properly executed.

Four, Motion to Suppress keys and attached knife is overruled. The Court finds the defendant knowingly consented to obtain keys prior to his-- rather, the police obtained possession of keys and knife with knowledge and consent of the defendant.

Five, Motion to Declare Tow of the defendant's car after an illegal arrest is overruled. The police had the right to tow and secure and search the defendant's car and my ruling is that

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it was not illegal. The Motion to Suppress Oral Statements that is on

November 25, 1975, and at 2:00 A.M., and at 10:00 A.M., on 11-22-75, is overruled.

The Court finds the defendant was advised of all his constitutional rights. The defendant then demonstrated and indicated he understood his rights knowingly and intelligently.

The Motion to Suppress the written statement approximately 11-22-75 is overruled. The Court finds the defendant, prior to written statement was advised of his rights fully and he intelligently and knowingly agreed to give a written statement and indicated the facts and he was given his rights in the statement and the Court finds prior to the defendant being advised of his rights before taking this written statement he had been given his rights, constitutional rights on at least two other occasions prior to the time and this statement was not a product of a promise or threat by any detective of the Cleveland Police Department.

The Motion to Suppress Oral Statements as given Detective Ferris on 11-28-75, at approximately 11:00 A.M., to 1:00 P.M. is overruled. The Court

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finds the defendant requested to talk to Detective Ferris alone on that morning.

The Court finds the defendant was again advised of his constitutional rights, that he understood these rights and knowingly and intelligently and voluntarily talked to Detective Ferris.

The evidence shows the defendant refused to reduce what he said to writing and requested to see an attorney before this was done and after he orally talked to Detective Ferris.

The defendant had been represented by an attorney for approximately one week and had been seen that morning at the arraignment and it can be inferred from this that he had been in consultation with his attorney during the week's period and was intelligently and with knowledge of his constitutional rights informed by his counsel.

The court further finds the defendant was well aware of his rights before, after and during the conversation with Detective Ferris.

The Court further finds the defendant would not talk with other detectives, hence, the conversation with Comodeca subsequent to his

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conversation with Detective Ferris shall be stricken.

He asked to talk to his attorney after conversation with Detective Ferris, but before conversation with Comodeca and the fact is that the defendant had been arraigned and was represented by an attorney which does not prevent the defendant from knowingly and intelligently waiving his rights to be represented by counsel.

He can still confer with the detectives. His only request to do so,

the Court finds, the defendant was present with Detective Ferris to be questioned on other matters than that which he was arraigned on that morning when he asked to talk to Detective Ferris on his own volition.

The Court finds no threats or physical harm used by any detective upon the defendant and that this thing with the detective was his own idea, his request.

The evidence shows from the defendant's own testimony and from his demeanor on the stand that he had nothing to hide and would cooperate with the police at all phases during the investigation. The fact of the matter is that the defendant willingly, intelligently talked to the detective which was

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demonstrated by the defendant himself when he testified in the hearing and stated he talked with Detective Ferris, but when Detective Comodeca came in the room, he refused to say anything when he or other detectives were present, besides Detective Ferris.

This also corroborates the fact the defendant wanted to talk with Detective Ferris and this conversation was to take place without other persons being present other than Detective Ferris. When other persons were present, the defendant himself said, "I will say nothing."

The Motion to Suppress Similar Acts testimony shall be granted and

overruled in part. The testimony of Kimberly Stephens and Mari Nettgen and Lisa Chambers are deemed to be like and similar acts which meet the requirements of that statute.

The Court further finds that Diane Lawson and Mrs. Main are not like and similar acts and shall be stricken and not allowed to testify.

The Court finds the testimony of the witness Yates and Corrigan are not like and similar acts but go to the activities of the defendant on the day the victim allegedly disappeared and their

* * *

EXCERPTS FROM OFFICIAL TRANSCRIPT OF PROCEEDINGS - STATE V. JOHN JOHNSON, CUYAHOGA COMMON PLEAS COURT - TRIAL TESTIMONY OF DETECTIVE FERRIS CONCERNING ORAL STATEMENT OF NOVEMBER 28, 1975 - TRANSCRIPT PAGES 2408 - 2416.

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* * *

A Do you want me to read the report, sir?

Q I want you to read the report to whatever extent you feel necessary to tell this jury everything that is necessary, and if it is necessary to read it, so be it, but if you can recall independently, your own recollection as to what was said --

MR. SPERLI: Your Honor, I object to reading his summary of what the conversation was. He can refresh his recollection.

THE COURT: He may give us his impression of what was said at the time, and he may use that if need be to refresh his recollection. He may read the statement and then verbally give the recollection as to being refreshed as to what was said.

Q Please proceed, Detective Ferris.

A John started out the conversation by saying, "I have been foolish for not saying this before, but I suffer from blackouts."

He went on to say he suffers from blackouts because of his hot temper and he went on to say at one time he apparently woke up from an apparent blackout and his wife asked him if he remembered what he had done and he told her, no,

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and she said, "You tried to put holes in my head."

On the day with the little girl, he said that he was mad about the new manager at the gas station and -- which started it off, and, then, he also said that on the day when he came home, when he was muddy and bloody, he stated that he walked in the house, and when he took his trousers off, he saw his shorts were full of blood, he stated at that time that he thought of the little girl.

Q Now, he was relating his recollection of his thoughts to you on November 20, is that correct?

MR. SPERLI: Objection.

THE COURT: Sustained.

Q Now, he was relating to you his recollection of his thoughts on November 20, is that correct?

MR. SPERLI: Objection, your Honor.

THE COURT: Sustained.

Q Do you know what date he was referring to with respect to those recollections which Mr. Johnson was relating to you?

A He was referring to the little girl on the 20th. He also stated at that time, and I then brought

p. 2410

to his attention about the little girl, it was not published in the papers until Friday or Saturday which was the 21st or 22nd about the little girl, and, in fact, the little girl was not found until the 22nd.

I believe that was on a Saturday, and at that time he stated it must be in his mind somewhere. He said, "You got me."

Q Go ahead with the remainder of the conversation.

A John Johnson then went on to say that -- and I asked John Johnson, I said, "Well, could that blood be from somewhere else, maybe another man or another woman, a dog, any type of animal?

He stated, "No."

Then I asked him if it could have come from his wife, maybe she was having her period and maybe he had intercourse with her, and he said, "No. Her period isn't even due at this time." Or something to that effect. She is not due for some time or -- I don't know the exact words. It would be in the report.

Q Did you ever ask Mr. Johnson whether he could have killed the little girl?

A I asked Mr. Johnson, I said, "John, could you have killed the little girl?"

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MR. SPERLI: Objection.

THE COURT: Overruled. He may answer.

Q What was his response to that?

A He said, "Yes, I could have killed my own wife that day."

Q Go ahead with what he related to you.

A I then asked John about the fight he supposedly had at West 65th and Clark Avenue that he reported earlier to the police.

John stated, you know, he is stupid, but that was a bullshit thing.

Q Do you know what he meant by that?

MR. SPERLI: Objection.

THE COURT: Sustained.

A He then went on to say there was a fight, he made that story up so his wife would not get involved in anything.

Q All right. Go ahead.

A And that is the story he told his wife. He stated to me that was the

same story that he told his wife, told his wife.

Q Go on with what he also related to you.

A Could I refresh --

Q Yes, you may refresh your recollection by reading

p. 2412

your report.

A I asked John what he had on the day when he was with the little girl where all the blood was and he stated that he was wearing work shoes, red trousers and a gray sweatshirt along with his shorts that were found by the police.

He also stated his wife had washed his trousers and his sweatshirt and put them up.

He also stated that his gray sweatshirt was in his property at the County Jail and it had been washed, but it was there at County Jail.

He stated his trousers should be at home.

Q Did he state anything to you about the blood on his shorts?

A He stated when he saw the blood on his shorts that he became frightened and didn't know what he had done and thought about the little girl.

Q All right. Now, did you have an occasion -- I am sorry. Go ahead.

A He also stated he threw his shorts in the garbage can and he said he was never -- his wife never saw the shorts. All she saw was his trousers, sweatshirt and clothing.

A What else did he relate to you, if anything,

p. 2413

Detective Ferris?

A He stated that he could account for most of his time that day, but he said there was a period in his mind that was blank and he could not account for it.

Q Did he give you a time frame for that period?

A Yes, he did.

Q What time frame did he give you?

A He said he had been up the day before on the 20th for 24 hours and he got to bed that morning at 4:00 o'clock in the morning.

He said he awoke at 5:00 o'clock in the morning, went to the gas station where he was employed at 5:30, and at 9:30 he said he was tired and he decided to go home and sleep.

He took some glasses to a bar. He went to Reed's Bar on West 73rd

between Clark and Denison Avenue to pass out -- I think it was a give-away program with glasses given out at the station. He went to give these glasses or pass them out at the bar and he stayed at the bar until about 10:30 or 10:40.

Then he went home. He couldn't sleep. He watched TV.

At 12:45 p.m. he left the house and

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arrived back at the station.

He stated he checked out the station, stayed out there until 2:30, to his recollection, and then he also stated he talked to John Mesko when he was going to the Bounty Bar and told Mesko he was going for a drink for his birthday.

At the Bounty Bar he had drinks and took some type of pill from the barmaid, the barmaid had given him, and he mentioned that there was a Mike from the gas station at the Wheel Cafe and he went there and had another beer.

Then he was asked to move his car because it was blocking a tanker truck. He moved the car and went to the Wheel Cafe.

After drinking more, he went to the station, back to the gas station and then he stated at one time he

visited Lawson's on West 87th and Denison and bought milk.

Then he went home. When he got home, that is when he found he had blood and mud on his clothing.

He stated he couldn't remember how he got the mud and the blood on him, but he knew it was not from a fight as he stated earlier to the police.

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Q Now, Detective Ferris, what Mr. Johnson related to you about the blackouts, did he say anything further about any psychiatric examination?

A Yes. He said that 14 or 15 years ago he went to a psychiatrist, and I assume it was a female psychiatrist, because he said she said there is something there but she just couldn't put her finger on it, didn't know what it was.

He also stated that he didn't want to go to Lima for eight years, come out of Lima and then go to jail for twenty years after he was released from Lima.

Q Did you have an occasion to recover the gray sweatshirt he stated was in the police property room?

A Yes, sir.

(Thereupon article was marked as State of Ohio Exhibit 32.)

Q Detective Ferris, I am handing you what has been marked for the purpose of identification as State of Ohio Exhibit 32. Will you kindly examine that exhibit? Have you seen that exhibit before?

A Yes, sir.

Q Where have you seen it before?

A This is the shirt I got from the property at

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County Jail belonging to John Johnson.

Q All right. Did John Johnson state anything in particular with respect to the shirt?

A He stated that this was the shirt he wore on the 20th which was bloody and muddy. He stated he had blood from the waist up to the chest, also on both sleeves.

Q Did he state whether or not that had been washed?

A He stated it had been washed.

Q All right. Is there anything else, to your knowledge, Mr. Johnson stated to you in your oral interview with him on that date?

A Yes, sir. I asked John Johnson if he were to drive to the park, Metropolitan Park, where the girl was found, how he would drive.

He told me up Lorain Avenue past Fairview Park Hospital, turn left, go past the golf course.

I then asked him why he wouldn't take the freeway or why he wouldn't go the Interstate and he stated because his car heated up.

Q Now, Detective Ferris, at any time during the course of your interview with Mr. Johnson, was he put under any fear through you?

MR. SPERLI: Objection.

* * *

AFFIDAVIT FOR SEARCH WARRANT
OF JOHN JOHNSON APARTMENT
11/22/75

STATE OF OHIO
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS

AFFIDAVIT FOR SEARCH WARRANT

Before me, Norman A. Fuerst, a judge of the Court of Common Pleas, Cuyahoga County, Ohio, personally came the undersigned detective Eugene J. Volk Det, # 2168 who being first duly sworn deposes and says that he is a member of the Police Department of the City of Cleveland, Ohio and that on or about November 20, 1975 in the City of Cleveland, certain personal property hereinafter described, being the property of one JOHN A. JOHNSON or MELLISA HINKE was used as a means or instrumentality in the commission of a criminal offense to-wit the kidnapping and murder of MELLISA HINKE or is evidence of the commission of said offenses. Said property is described as:

> Trace evidence consisting of the personal property of MELISSA HINKE, further physical evidence consisting of blood, semen, Lawson's receipt, clothing, shoes, hair, specimens of foliage, weapons, instruments or tools used in the commission of the crime.

Affiant believes and has good cause to believe that said personal property or some part thereof is now being unlawfully

kept, concealed, and possessed in the City of Cleveland on the premises known as:

> 2006 West Blvd, apartment 1-A, Cleveland Ohio, or fully described as a 3 story red brick building and the same being the resident of JOHN A. JOHNSON.

The facts upon which affiant bases such belief are as follows: Affiant states that on November 20, 1975, the Cleveland Police Department commenced an investigation into the abduction of one MELISSA HINKE upon receiving a report from MRS. JANICE HINKE that her daughter MELISSA HINKE age 8 was missing her absence being unexplained. Affiant further states that during the course of said investigation, it was learned from one MR. BOZAK that JOHN A JOHNSON's 1968 Buick Ohio license number 350184 red body black vinyl top, was seen at or near the area where said MELISSA HINKE was last seen and that MR. BOZAK further observed the driver of the above described vehicle attempt to abduct a young female child the same having occurred at or near the time of MELISSA HINKE's disappearance. Subsequent investigation revealed that JOHN A JOHNSON was the owner of the above described automobile. As a result of the above information, officers of the Cleveland Police Department went to JOHN JOHNSON's address at 2006 West Blvd, at which time JOHN A JOHNSON allowed these officers to check his car. As a result of this cursory search, 2 Pepsi bottles, 1 carton of Lawson's milk in a bag, a towel which was analysed by

the scientific investigation unit and found to have semen present.

Affiant further states, that on November 22, 1975, the partially clothed body of MELLISA HINKE was found in a wooded area of the Cleveland Metropolitan Park-North Olmsted, Ohio with numerous puncture wounds of the upper torso and bleeding from the rectal area. Affiant further states, the body of MELISSA HINKE was conveyed to the county coroner's office by the Park Rangers.

Affiant avers that it is urgently necessary that the above mentioned premises be searched in the night season forthwith to prevent the above named personal property from being concealed or removed so as not to be found.

/s/Eugene J. Volk Det. #2168
AFFIANT

SWORN to before me and subscribed in my presence this 22d day of November, 1975.

CONSTITUTION OF THE UNITED STATES

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE

§2905.01 Kidnapping.

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against his will;

(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances which create a substantial risk of serious physical harm to the victim:

(1) Remove another from the place where he is found;

(2) Restrain another of his liberty;

(3) Hold another in a condition of involuntary servitude.

(C) Whoever violates this section is guilty of kidnapping, a felony of the first degree. If the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

§2907.02 Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of rape, a felony of the first

degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

§2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§2945.59 Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to shown the commission of another crime by the defendant.